Filed 5/22/19 P. v. Hof CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. SHAWN EUGENE HOF, JR., Defendant and Appellant.	A153452 (Humboldt County Super. Ct. No. CR1605242)

In December 2017, defendant Shawn Eugene Hof, Jr., reached a plea agreement with the People, agreeing to plead guilty to various charges and admit personal use of a firearm in exchange for a stipulated sentence and dismissal of other charges and enhancement allegations. On January 16, 2018, the trial court imposed the agreed-upon sentence.

Hof now contends the trial court erred at sentencing in failing to exercise its discretion to dismiss the firearm enhancement pursuant to Senate Bill No. 620 (2017-2018 Reg. Sess.) (S.B. 620), which went into effect January 1, 2018. He further contends his own trial counsel provided ineffective assistance in failing to argue for dismissal of the firearm enhancement pursuant to the new law. Hof also seeks remand to allow him to make a record of mitigating evidence relevant to his eventual youth offender parole hearing, and the Attorney General agrees remand for this purpose is appropriate.

We agree with the parties that Hof should be allowed to make a record for his eventual youth offender parole hearing and will order a limited remand. Otherwise, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In the early hours of August 21, 2016, California Department of Fish and Wildlife game warden Matthew Wells was on patrol in Humboldt County, looking for illegal night hunting activity. He observed a pickup truck traveling very slowly on Redwood House Road, a curving and steep gravel road. An individual was standing in the bed of the truck and shining a handheld spotlight into the forest and fields on the side of the road. Wells attempted to stop the truck by turning on his patrol vehicle's lights and siren, but the truck did not stop. Wells saw a handgun in the hands of the individual in the bed of the truck, and he saw a flash and heard the report of a firearm discharging. About six shots were fired toward Wells's vehicle. The individual in the bed of the truck entered the cab through the rear sliding glass window, and the truck accelerated. Wells followed the truck and observed and heard several more gunshots emanating from the passenger side of the truck. The truck reached speeds of 50 miles per hour, which was unsafe for the conditions of the road, and eventually hit a redwood tree. The occupants of the truck fled on foot. Law enforcement investigation led to Hof being identified as the shooter.[1]

Hof was charged with attempted murder of a peace officer (Pen. Code,[2] §§ 187, subd. (a), 664; count 1), assault with a firearm upon a peace officer (§ 245, subd. (d)(1); count 2), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 3), resisting an executive officer (§ 69; count 4), shooting at an occupied motor vehicle (§ 246; count 5), and misdemeanor use of an artificial light to hunt (Fish & G. Code, § 2005, subd. (a); count 6).

For counts 1 and 2, it was further alleged Hof personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). For counts 1 through 4, it was alleged Hof personally used a firearm (§§ 12022.53, subd. (b), 1203.06, subd. (a)(1)).

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[1] The preceding facts are based on the preliminary hearing transcript, which Hof and his trial counsel stipulated provided a factual basis for Hof's guilty plea.

[2] Further undesignated statutory references are to the Penal Code.

Hof was arrested on August 10, 2017. He pleaded not guilty, and jury selection for his trial began on November 27, 2017.

On December 12, 2017, while jury selection was in progress, counsel for the parties advised the court they had reached a negotiated disposition.

Hof agreed (1) to plead guilty to counts 2 through 4 and 6, (2) to plead guilty to grossly negligent discharge of a firearm (§ 246.3, subd. (a)), a lesser offense of count 5, and (3) to admit personal use of a firearm (§ 12022.53, subd. (b)) in the commission of count 2. The People agreed to dismiss count 1 (attempted murder) and the remaining special allegations, including the allegation Hof personally and intentionally discharged a firearm. The parties agreed to a sentence of 20 years in state prison consisting of the upper term of eight years for count 2, a consecutive 10 years for the firearm enhancement under section 12022.53, subdivision (b), and three consecutive eight-month terms for counts 3 and 4 and the violation of section 246.3 (the lesser offense to count 5).[3]

The trial court accepted Hof's change of plea and dismissed the remaining charges and special allegations.

On January 16, 2018, the trial court sentenced Hof to 20 years in state prison "[p]ursuant to the negotiated disposition."

DISCUSSION

A. *S.B. 620*

Hof contends the trial court was unaware at sentencing of its discretionary authority to dismiss or strike the firearm enhancement under S.B. 620. He seeks remand to the trial court to allow it to exercise its discretion in resentencing. Hof does not seek to withdraw his plea and, indeed, argues that, if the trial court were to dismiss the firearm enhancement on remand (thereby reducing his sentence 10 years), the People could not seek to set aside the plea.

[3] The parties agreed to a concurrent six-month term for count 6, misdemeanor use of an artificial light for hunting.

1. Relevant Dates: Change in Law, the Plea Agreement, and Sentencing

On October 11, 2017, the Governor signed S.B. 620, which, when effective, "amended section 12022.53 to grant trial courts, for the first time, the discretion to strike section 12022.53's firearm enhancements. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.)." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 54 (*Hurlic*).)

On December 12, 2017, Hof and the People reached a plea agreement for a stipulated 20-year sentence. ~(CT 280-82)~ Pursuant to the agreement, Hof admitted he personally used a firearm in the commission of count 2 (assault with a firearm of a peace officer) and agreed to a 10-year enhancement under section 12022.53, subdivision (b).

On January 1, 2018, S.B. 620 went into effect. Section 12022.53, subdivision (h), now provides, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law."[4]

On January 16, 2018, the trial court imposed the sentence specified in the plea agreement.

2. Hof Fails to Demonstrate Trial Court Error at Sentencing

Hof contends the trial court erred at sentencing in failing to exercise its discretion to dismiss the firearm enhancement pursuant to S.B. 620. We reject this contention.[5]

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[4] Section 12022.53 was amended again by Senate Bill No. 1494 (2017-2018 Reg. Sess.) without change to subdivision (h).

[5] As a preliminary matter, the Attorney General argues Hof's appellate claim based on S.B. 620 is barred because Hof did not obtain a certificate of probable cause. There is a split of authority on whether a defendant is required to obtain a certificate of probable cause to raise an appellate claim such as Hof's. In *Hurlic*, *supra*, 25 Cal.App.5th at pages 53–54, the defendant reached a plea agreement for a 25-year sentence and received that sentence in 2017. On appeal in 2018, the defendant argued he was entitled to ask the trial court to exercise its new discretion under S.B. 620 to strike the 20-year firearm enhancement. The Second District, Division Two, agreed and remanded the case for resentencing; the court further held the defendant was not required to obtain a certificate of probable cause to raise his appellate claim. (*Id*. at p. 59; accord *People v. Baldivia* (2018) 28 Cal.App.5th 1071, 1074.) On the other hand, in *People v.*

"A court is 'presumed to have been aware of and followed the applicable law' when imposing a sentence." (*People v. Reyes* (2016) 246 Cal.App.4th 62, 82; see *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527 ["in light of the presumption on a silent record that the trial court is aware of the applicable law, including statutory discretion at sentencing, we cannot presume error where the record does not establish on its face that the trial court misunderstood the scope of that discretion"]; *People v. Mosley* (1997) 53 Cal.App.4th 489, 496, 498 [presuming that, 53 days after the decision in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 was filed, the sentencing court knew of its authority to strike prior serious felony convictions and chose not to do so].)

To prevail on his claim, Hof must "affirmatively demonstrate that the trial court misunderstood its sentencing discretion." (*People v. Davis* (1996) 50 Cal.App.4th 168.) But nothing in the record indicates the trial court was unaware of its newly-granted authority to exercise discretion under S.B. 620. Where, as here, "the record is silent, . . . the defendant has failed to sustain his burden of proving error, and we affirm." (*People v. Lee* (2017) 16 Cal.App.5th 861, 867.)

Hof makes a circuitous and unpersuasive argument that the sentencing record reveals the trial court was unaware of its sentencing discretion. This argument is premised on his claim that the probation officer and trial counsel misinformed the court that count 2 (assault with a firearm of a peace officer in violation of section 245, subdivision (d)(1)) was a violent felony. In fact, Hof points out, assault with a firearm of a peace officer by itself does not qualify as a "violent felony" under section 667.5,

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Fox (May 3, 2019, A153133) 2019 WL 1967716, *2, *9 (*Fox*), the defendant sought similar relief (remand for resentencing under S.B. 620 after being sentenced, in 2017, to the 15-year term he agreed to in a plea agreement), but Division One of our court dismissed the appeal for lack of a certificate of probable cause. (See also *People v. Kelly* (2019) 32 Cal.App.5th 1013, 1015 [where the defendant sought remand for resentencing under a newly enacted change in sentencing law, the appeal was dismissed for failure to obtain a certificate of probable cause].) We decline to decide whether a certificate of probable cause is required in this case because, even assuming a certificate was not necessary, Hof's appellate claim fails.

subdivision (c), and it was Hof's admission of personal use of a firearm in violation of section 12022.53 that made the crime a violent felony. (§ 667.5, subd. (c)(22).)

Hof's argument is unavailing. First, the probation officer's apparent misstatement about what violation qualified as a violent felony does not show the trial court misunderstood the law.[6] Second and more important, even if the probation officer's misstatement could be imputed to the court, it would not demonstrate the trial court harbored a misunderstanding about its statutory discretionary authority *under S.B. 620*. In other words, even if the trial court incorrectly believed count 2 by itself qualified as a violent felony, this would not show the court was unaware of its discretionary authority to dismiss or strike the firearm enhancement under S.B. 620.

In short, Hof's claim of trial court error fails because he has not affirmatively demonstrated that the court misunderstood its sentencing discretion.

3. Hof Fails to Establish Ineffective Assistance of Counsel on this Record

Hof next argues his own trial counsel provided ineffective assistance of counsel in failing to argue for dismissal of the firearm enhancement at sentencing in January 2018, after S.B. 620 was in effect.[7]

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[6] In the probation officer's report, count 2 is described as a serious and violent felony. Thus, the probation officer incorrectly indicated that assault with a firearm of a peace officer is a violent felony. We do not agree with Hof, however, that his own trial counsel misinformed the court about count 2. At sentencing, trial counsel stated that Hof accrued conduct credits at 15 percent "due to the nature of the offense, with the enhancement—or, the primary offense, I should say." Hof takes the position that his counsel's statement misinformed the court that count 2, by itself, was a violent felony (because the 15-percent limitation applies to violent felonies (§§ 29331.1, 667.5, subd. (c)). But fairly reading the transcript of the sentencing hearing, we believe counsel was simply stating that Hof accrued conduct credit at 15 percent "due to" "the primary offense" (i.e., count 2) "*with the enhancement*." (Italics added.) This is a correct statement of the law; it was the enhancement to count 2 that made the offense a violent felony.

[7] Hof does not claim counsel was ineffective in negotiating the disposition in December 2017. Nor does he seek to withdraw his guilty plea.

To prevail on a claim of ineffective assistance of counsel, "the defendant must demonstrate counsel's inadequacy. To satisfy this burden, the defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. When examining an ineffective assistance claim, a reviewing court defers to counsel's reasonable tactical decisions, and there is a presumption counsel acted within the wide range of reasonable professional assistance. It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

Hof argues there is no satisfactory explanation for his counsel's failure, at sentencing in January 2018, to ask the trial court to strike or dismiss the firearm enhancement pursuant to S.B. 620. The Attorney General responds that trial counsel could have chosen not to ask the court to strike the firearm enhancement because he reasonably determined such a request would be futile. (See *People v. Price* (1991) 1 Cal.4th 324, 387 ["Counsel does not render ineffective assistance by failing to make motions or objections that counsel reasonably determines would be futile."].)

We agree with the Attorney General it is possible defense counsel reasonably could have determined at sentencing it would be futile to ask the trial court to exercise its newly-granted discretion to strike the firearm enhancement under S.B. 620. In other words, we conclude the record does not affirmatively disclose that counsel had no rational tactical purpose for his omission.

When Hof reached the plea agreement with the People on December 12, 2017, the trial had started and Hof faced a possible sentence of 29 years for count 1 (attempted

murder) and the firearm discharge enhancement alone.[8] Based on the preliminary hearing, defense counsel would have expected game warden Wells to testify that Hof fired more than six shots at his vehicle and would have expected other evidence to show at least seven .45 caliber casings were recovered from Redwood House Road after the incident.

We do not know the circumstances or discussions that may have taken place that led to Hof accepting the plea agreement, but we know Hof agreed to the People's offer of a 20-year stipulated sentence (reached by imposing the upper term for count 2, plus a 10-year enhancement of personal use of a firearm[9]), and the trial court accepted the parties' plea agreement. The same day the court took Hof's change of plea, it scheduled sentencing for January 16, 2018.

Given that the Governor signed S.B. 620 more than two months before the plea agreement, the parties may have known about the law and may have reached the plea agreement with the understanding that the stipulated sentence would control notwithstanding the intervening change in the law. (See *Fox*, *supra*, 2019 WL 1967716, at *6 [where the defendant entered his plea a week after S.B. 620 passed the legislature, S.B. 620 "was already part of the legal landscape" and defense counsel's comments at sentencing showed "the parties understood that [defendant] would *not* have the benefit of the new law once it went into effect"].) At sentencing, held five weeks after Hof entered

[8] The upper term for attempted murder is nine years, and the additional consecutive term for personally and intentionally discharging a firearm in the commission of attempted murder or assault with a firearm on a peace officer is 20 years. (§§ 664, subd. (a), 12022.53, subds. (a)(1), (7), (c).) Hof also faced the possibility of additional consecutive terms of one-third the middle terms for counts 3 and 4 and potentially count 5. (§ 1170.1.)

[9] The enhancement for personal *use* of a firearm in the commission of assault with a firearm on a peace officer is 10 years, while the enhancement for personally and intentionally *discharging* a firearm (the original enhancement alleged with counts 1 and 2) in the commission of the offense is 20 years. (§ 12022.53, subds. (b), (c).)

his plea, defense counsel offered no reason why the stipulated sentence should not be imposed.

We cannot say, on this record, that it was ineffective for defense counsel not to ask the trial court to exercise its newfound discretion under S.B. 620 to dismiss the firearm enhancement. Defense counsel may have been aware of circumstances that rendered such a request futile.[10] Accordingly, Hof cannot establish his claim of ineffective assistance of counsel on direct appeal.

B. *Youth Offender Parole Hearing*

Because Hof was 24 years old at the time of the offense, he will be entitled to a youth offender parole hearing during his 15th year of incarceration. (§ 3051, subd. (b)(1).) Hof requests a remand because trial counsel was ineffective in failing to make a record relevant to a youth offender parole hearing, and the Attorney General concedes a remand is appropriate in this case.

We agree with the parties and order remand for the limited purpose of allowing the parties to make a record of information relevant to Hof's eventual youth offender parole hearing. (*People v. Franklin* (2016) 63 Cal.4th 261, 286–287 and *People v. Costella* (2017) 11 Cal.App.5th 1, 10.)

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[10] Trial counsel may also have relied on *People v. Enlow* (1998) 64 Cal.App.4th 850. There, defendant Enlow reached a plea agreement in 1996, agreeing to plead guilty to one count and to admit one prior conviction in exchange for an eight-year sentence and dismissal of various other counts and allegations of prison priors. On appeal, Enlow argued he was entitled to a reduction of his sentence based on a change in law that went into effect in 1997. (*Id*. at pp. 852–853.) The Court of Appeal rejected this argument, explaining, "Since the prison term was specifically negotiated by the parties, a reduction in the term would deprive the prosecution of one of the benefits for which it had bargained, i.e., an eight-year prison term. Enlow is not entitled to retain the benefit of the agreement (the dismissal of numerous other counts) while depriving the prosecution of its benefit (the eight-year term). Therefore, it would be improper for us to reduce the sentence. Enlow's remedy would be to seek withdrawal of his guilty plea." (*Id*. at p. 854.) Relying on *Enlow*, trial counsel could have determined that asking the court to dismiss the firearm enhancement would be improper and that the only way to invoke S.B. 620 would be for Hof to withdraw his guilty plea.

DISPOSITION

The matter is remanded for the limited purpose of allowing the parties to make a record for Hof's eventual youth offender parole hearing. In all other respects, the judgment is affirmed.

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Miller, J.

We concur:

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Richman, Acting P.J.

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Stewart, J.

A153452, *People v. Hof*